IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 916 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

PATEL KHODA KARSHAN

Appearance:

1. Criminal Appeal No. 916 of 1985
Shri B D Desai, APP for Petitioner
MR AD SHAH for Respondent No. 1, 2

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE D.P.BUCH

Date of decision: 13/03/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

The acquittal of the respondents of the offences punishable under Sections 302, 504 read with section 34 of the Indian Penal Code recorded by the learned Sessions Judge, Bhavnagar vide judgment dated 30.5.1985 rendered in Sessions Case No.1/95 is under challenge in the present appeal, which is filed under section 378 of the Criminal Procedure, 1973.

2. The complainant Vithalbhai Dhanjibhai Patel is resident of village, Athevada, District Bhavnagar. The incident in question took place on November 18, 1984. On that day, according to the prosecution, deceased Dhanjibhai Patel and complainant Vithalbhai Patel were going on their respective bicycles for attending Ramparayan Saptah which was being conducted by Sant Morari Das at Bhavnagar City. When they reached near the outskirts of the village, they were accosted by the respondents and they tried to know from the deceased as to why he was trying to recover the outstanding dues in the village. According to the prosecution, the respondents were armed with weapons and, respondent no.1 caused injury to the deceased with blunt portion of an axe whereas respondent no.2 caused injuries to the deceased with blunt portion of a Dharia. The prosecution claims that because of commotion several persons had collected at the place of incident, as a result of which the accused had run away. The deceased who was seriously injured and was profusely bleeding, was removed to Sir Taktasinh Hospital, Bhavnagar. At the hospital, police Head Constable Ganpatbhai Chavda attached to 'A' Division Police Station, Bhavnagar was on duty. Dr. Adhyaru, who was discharging duties at the said hospital had sent a yadi to 'A' division police station informing that the deceased had sustained injuries. On receipt of the yadi, P.S.O., Incharge of 'A' division police station had directed the Police Head Constable Mr Chavda to make enquiries and inform the police station. Thereupon, the police Head Constable Ganpatbhai Chavda had informed 'A' division police station and had recorded thereafter the F.I.R. of Mr Vithalbhai Patel. The F.I.R. lodged was investigated by one Devdas M Salve, who was Police Inspector at 'A' division police station. During the course of treatment, the injured expired at about 1.30 p.m. and, therefore, offence of murder was registered. At the conclusion of investigation, the accused were charge-sheeted for the offences punishable under sections 302, 504 read with section 34 of the I.P.C. As the offence punishable under section 302 of the IPC is exclusively triable by a court of Sessions, the case was committed for trial to Court of Sessions at Bhavnagar,

where it was registered as Sessions Case No.1/85. The learned Judge had framed charges against the accused at Exh.3 for the offences punishable under sections 302 and 504 read with section 34 of the I.P.C. The charges were read over and explained to the respondents, who pleaded not guilty to the same and claimed to be tried. Therefore, the prosecution examined (1) Dr. Bharat J Somani, P.W.1, Exh.12, (2) Vithalbhai Dhanjibhai Patel, P.W.2, Exh.15, who claimed to be eye witness and who had lodged the complaint, (3) Harjibhai Jasmatbhai, P.W.3, Exh.20, who also claimed to be eye witness, (4)) Oghadbhai Hamirbhai, P.W.4, Exh.21, who also claimed to be eye witness, (5) Bachubhai Ganeshbhai, P.W.5, Exh.22, who claimed that he had witnessed the incident, (6) Bhimabhai Keshavbhai, P.W.6, Exh.23, who also claimed to be eye witness,(7) Sultanbhai Akbarbhai, P.W.7, Exh.24, Circle Inspector who had prepared map of scene of incident, (8) Badarudin Allaudin, P.W.8, Exh. 28 in whose rickshaw, the deceased was removed from the place of incident to Sir Takatsinh Hospital, Bhavnagar, (9) Parvatiben Haribhai, P.W.9, Exh.29, a distant relative of the deceased and who had reached the scene of offence subsequently, (10) Roopsingh Kanchi, P.W.10, Exh.30, (11) Manji Vasta, P.W.11, Exh.31, (12) Panch witnesses in whose presence the blood-stained earth was seized for analysis, (13) Usmanbhai Hussain, P.W. 12, Exh.33, Panch witness in whose presence discovery of Dharia at the instance of respondent no.2 was allegedly made, (14) Bhupatbhai Laxmanbhai, P.W.13, Exh.35, in whose presence the dharia at the instance of respondent is alleged to have been discovered, (15) Navinchandra Vithalbhai, P.W.14, Exh.36, Panch witness in whose presence, according to the prosecution, an axe was discovered at the instance of respondent no.1, (16) Ganpatbhai Chavda, Police Head Constable of 'A' Division Police Station, who was discharging duties at Sir Takatsinh Hospital, Bhavnagar and, who had recorded the F.I.R. of Vithalbhai Patel, P.W.2, Exh.15, Exh.38, (17) Chelsankal Laxmishankar, P.W.16, Exh.41, P.S.O. 'A' Division Police Station, Bhavnagar, who had directed Head Constable Mr Chavda to make enquiries pursuant to receipt of Yadi from Dr. Adhyaru, (18) Devdas Mangaji Salve, Police Inspector, 'A' Division Police Station, Bhavnagar, who had investigated the case and also produced documentary evidence such as panchnama place of incident, inquest report, post mortem notes, map of place of incident, discovery panchnamas, F.I.R. etc. to prove its case against the respondents. After recording of the evidence of the prosecution witnesses was over, learned Judge recorded statements of the respondents under section 313 of the Code and explained to them the circumstances

appearing against them in the evidence. In their further statements under section 313, the respondents denied the prosecution case but did not examine any witness in their defence. On appreciation of evidence, the learned Judge deduced that the witnesses had tried to improve upon the version of infliction of blows with blunt part of the weapons to make their testimony consistent with medical evidence. The learned Judge further found that presence of so-called eye witnesses at or about the time of incident did not appear to be natural and it was more probable that they had come to the place of incident subsequently. The learned Judge noticed reluctance on the part of the eye witnesses to admit the relations with the deceased and observed that all the witnesses had deposed before the Court as if they were totally independent witnesses, though in fact they were related to the deceased. The learned Judge took into consideration absence of blood-stains on the clothes of the eye witnesses though according to them they had physically lifted the deceased from the ground and placed him in the rickshaw and deduced that absence of blood-stains on the clothes indicates that they were not present at the time when the incident took place. The learned Judge also noticed other facts such as none of the eye-witnesses tried to intervene and that only one cycle was found from the place of incident though it was claimed by Vithalbhai Patel that he and his father were going to attend Ramparayana Saptah of Sant Morari Das on different cycles. In view of the above-referred to glaring defects in the prosecution case, the learned Judge held that the prosecution failed to prove its case against the respondents beyond reasonable doubt and that the respondents were entitled to reasonable benefit of doubt. In view of the said conclusion, the learned Judge has acquitted the respondents vide judgment dated May 13, 1985 giving rise to the present appeal.

3. Mr B D Desai, learned APP has taken us through the entire evidence on record. Learned APP pleaded that the evidence of complainant Vithalbhai Patel which is corroborated by not only medical evidence on record, but also by evidence of other eye-witnesses establishes beyond reasonable doubt that the respondent No.1 who had caused injuries to the deceased with blunt portion of an axe whereas respondent no.2 had caused injuries to the deceased with blunt portion of dharia, which ultimately resulted in his death and, therefore, the respondents ought to have been convicted of the offences punishable under sections 302 and 504 read with section 34 of the IPC. According to the learned APP, the learned Judge has given undue importance to the minor contradictions

appearing in the evidence of prosecution witnesses and, therefore, the decision impugned which is quite contrary to the well settled principles of appreciation of evidence of the witnesses should be set aside. What was claimed by the learned APP for the State was that at the instance of the respondents, blood-stained weapons were discovered on which the blood having 'B' group, which was the blood group of the deceased was found and, therefore, in view of the consistent evidence given by the eye witnesses, the respondents should not have been acquitted. The learned APP lastly submitted that in view of the overwhelming reliable and cogent evidence led by the prosecution to establish guilt of the respondents, the appeal should be accepted and the respondents should be convicted of the offences punishable under Sections 302 and 504 read with section 34 of the IPC.

4. Mr Ashok D Shah, learned Counsel appearing for the respondents submitted that cogent and convincing reasons have been assigned by the learned Sessions Judge indicating as to how the prosecution has failed to prove its case against the respondents and, therefore, the acquittal appeal should not be accepted even if two views are possible. Learned Counsel drew the attention of this court to the examination and cross-examination of eye witnesses and pleaded that the learned Judge was justified in holding that the witnesses were not reliable and had gone to the place of incident subsequently. According to the learned Counsel for the defence, absence of blood marks on the clothes of the eye witnesses and their conduct proves that they had in fact not witnessed the incident but were deposing before the court to implicate the respondents falsely because of previous enmity. Learned Counsel for the respondents contended that the prosecution has miserably failed to establish its case against the respondents and, therefore, the acquittal appeal should be dismissed.

5. We have heard the learned Counsel for the parties and taken into consideration the evidence on record. Witness Vithalbhai Patel, P.W.2, Exh.15 has claimed that when he and his father were going on their respective bicycles to attend Ramparayana Saptah conducted by Sant Morari Das, at Bhavnagar, his father was assaulted with blunt portion of axe and dharia by respondents no.1 and 2 respectively. It is relevant to notice that the case of the prosecution is that the intention of the respondents was to cause death of the deceased and, therefore, it is not understood as to why the respondents who were alleged to be armed with sharp weapons like axe or dharia would use only the blunt edged side and not the sharp edged

side of the weapons. Medical evidence on record indicates that the deceased had received injuries which could be caused by blunt substance and, therefore, in order to make story consistent with the medical evidence, this witness has stated before the court that his father was assaulted by the respondents with blunt edged side of the weapons. At this stage, we may observe that the learned Sessions Judge has not exhibited the FIR lodged by witness Vithalbhai Patel on the ground that prior thereto the information about commission of cognizable offence was already received at 'A' division police station, Bhavnagar. We have gone through the entry made in the register maintained at the Hospital which is produced at Exh.39 as well as the message received at 'A' division police station, Bhavnagar from Police Head Constable, Chavda, who was on duty at the hospital at that time. On going through those messages, we are satisfied that those messages are cryptic in nature and were made for further instructions because if particulars about cognizable offence had been conveyed at the police station, the P.S.I. Incharge of 'A' division police station would not have directed the Head Constable Mr Chavda to make further enquiries and record complaint at the hospital. In our view, the cryptic message produced at Exh.33 or the information conveyed at 'A' division police station could not have been treated as FIR and, therefore, the learned Judge was not right in brushing aside the complaint filed by witness Vithalbhai Patel on the ground that it could not be treated as FIR. Mr A D Shah, learned Counsel for the respondents has also fairly conceded before the court that the cryptic messages could not have been treated as FIR in the case and that the complaint lodged by witness Vithalbhai Patel should be treated as FIR in the case. Under the circumstances, the FIR lodged by Mr Vithalbhai Patel is ordered to be treated as FIR with respect to the incident in question and is ordered to be exhibited as Exh.47-A.

6. On reading of FIR lodged by witness Dhanjibhai, it becomes evident that he had not disclosed in the said report that the respondents had caused injuries to the deceased with blunt edged side of the weapons. It is highly improbable and unlikely that when the respondents were armed with sharp weapons like axe and dharia, they would use only blunt edged side and not the sharp edged side of the weapons. We are convinced that the eye witnesses including the complainant had set out this version only to fit in what had been found in the post mortem report. Normal way in which an axe or dharia can be used is only from the sharp edged side and not from the blunt edged side and, it is highly unlikely that the

witnesses could have seen the incident narrated by them in evidence. It gives serious doubts as to their presence at the time of the incident. Moreover, according to the witness Vithalbhai Patel, he had also lifted his father from the ground with the help of Harjibhai and Oghadbhai in placing the deceased in a rickshaw, whereas witness Oghadbhai has stated that the deceased was placed in rickshaw by him and by Harjibhai. The claim of the so-called eye witness Vithalbhai who is the son of the deceased that he and his father was going to attend Ramparayana Saptah at Bhavnagar on their respective cycles is not probable because only one cycle was found from the place of incident and at the date of the incident witness Vithalbhai had sustained fracture in his leg and would not have been comfortable in riding his cycle for attending the place where Ramparayana Saptha was being held which was roughly at a distance of 3 kms. from the place of incidence. If witness Vithalbhai and other witnesses had been present at the place of incident when the deceased was being assaulted, at least one of them would have made an attempt to save the deceased but admittedly no such attempt was made by any of them. Further other witnesses had posed before the court that they were independent witnesses and were not related to the deceased at all but during the cross-examination they had to admit that they were closely related to the deceased. This becomes relevant because the evidence on record establishes that there was previous enmity between the witnesses and the deceased on the one hand and the respondents on the other hand. Though according to the witness Vithalbhai Patel as well as witness Harjibhai and Oghadbhai, they had lifted the deceased from the ground and placed him in rickshaw, admittedly, their clothes were blood-stained, even though according to them the deceased was profusely bleeding which creates a serious doubt about their presence at the time and place of incident.

7. There are major contradictions and omissions in the deposition of the eye witnesses which have been noticed by the learned Judge and discussed in detail. We are in general agreement with the view expressed by the learned Judge in the impugned judgment and we do not think it necessary to reiterate the same in the present judgment. This is so in view of the decisions of the Supreme Court in the case of State of Karnataka v. Hemareddy & Anr. reported in AIR 1981 SC 1417 and in the case of Girijanandini v. Bijendra Narain, reported in AIR 1967 SC 1124. The learned APP has failed to dislodge the reasons recorded by the learned Special Judge for acquitting the respondent and, therefore, the acquittal

appeal cannot be accepted. This is an acquittal appeal. Although in an appeal from an order of acquittal the powers of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against an order of conviction, yet, as rule of prudence, the Appellate Court would always give proper weight and consideration to such matters as (i) The views of the trial Judge as to the credibility of the witnesses; (ii) Presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (iii) the right of the accused to the reasonable benefit of any doubt; and (iv) slowness of an appellate court in disturbing a finding of fact arrived at by a Judge, who had the advantage of observing demeanor of the witnesses. The view taken by the learned Sessions Judge that the prosecution has failed to establish its case against the respondents beyond reasonable doubt is, in our view, eminently just, and even if another view is possible on the evidence on record, we would not be justified in interfering with the same in the present acquittal appeal. The result of the discussion is that we do not find any merits in the appeal.

9. For the foregoing reasons, the appeal fails and the same is dismissed. Muddamal to be disposed of in terms of directions given in the impugned judgment.

13.3.2001 [J N Panchal, J.]

[D P Buch, J.]

msp